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In The

Supreme Court of the United States

October Term, 1995

JEFFREY B. POMRANZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT IN REPLY

JEFFREY B. POMRANZ has petitioned this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 26, 1995, affirming the denial of his motion to vacate his conviction and sentence on a charge of carrying a firearm during and in relation to a conspiracy to distribute marijuana. In support of his petition, he has presented one reason why the writ should be granted: the decision below squarely conflicts with that of another circuit on the important constitutional criminal venue question presented.

Having been requested by the Court to file a response to the petition, the respondent concedes the inconsistency between a decision reached by the Ninth Circuit and that of the court below on the question of proper venue in the context presented, but asserts that the conflict does not justify review in this case, for both substantive and procedural reasons. None of the objections to the petition has merit.

1. The conflict in the circuits on the question presented warrants review by this Court.

In *United States v. Corona*, 34 F.2d 877 (9th Cir. 1994), the court of appeals held venue to have been improperly based, for all of the substantive counts charged there, including a count under 18 U.S.C. § 924(c), upon the venue for a related conspiracy count. The court below expressly disagreed. Appx. A7. Respondent acknowledges the conflict between the Ninth Circuit's decision and that of the court below, and refers, obliquely, to the

Fifth Circuit's recognition of this conflict and express statement of its disagreement with the Ninth. Brief in Opposition ("BO") 6, 12-14.

Respondent attempts to minimize the significance of the conflict as a reason for granting certiorari by focusing on the relative lack of discussion in *Corona* of § 924(c), as compared with its discussion of venue for the substantive drug offenses charged in that case. BO 12-14. But the court made clear in *Corona* that it found venue to be improper in Nevada for the gun count for the same reasons as the substantive drug counts: application of the "key verb test" mandated trial in California, where the "use of a firearm" and drug distribution entirely occurred, despite the fact that the offenses were committed in furtherance of a conspiracy spanning Nevada and California. 34 F.3d at 879, 881. The *Corona* court gave full consideration to the question and reached the opposite conclusion from that of the court below. There is no lack of conflict simply because the other circuit did not believe it necessary to discuss (or the government in that case had not advanced) all of the erroneous contentions relied on in the instant case. Faced with the same statutory offense, the Ninth Circuit came to a directly contrary result as to the propriety of venue; the court need not have explained the result in precisely the same terms as the Fifth Circuit in this case in order for that conflict to be genuine.

The respondent's attempt to refute petitioner's reliance on *United States v. Midstate Horticultural Co.*, 306 U.S. 161 (1939), misses the mark. True, the Court in that decision was vitally concerned with the fact that the transportation had occurred prior to the payment of the

unlawful rebate in relation to that transportation, and that the transportation itself, when it occurred, was not an offense. But the holding of the case is that *because of those circumstances* the crime of paying an unlawful rebate had not been "committed" in the constitutional sense, in a district through which that transportation had merely passed, notwithstanding a statute purporting to confer such venue. The *ratio decidendi* of *Midstate Horticultural*, is that an offense is not "committed," in the Article III and Sixth Amendment sense, in a place where circumstances occurred or existed that merely had a relationship to the *actus reus* but only where that act – the "verb element" – occurred.[1] That is the principle on which petitioner relies and which the Court below disregarded.

Nor is it advisable, contrary to respondent's suggestion, BO 14, that this Court wait to offer guidance to the lower courts on the fundamental venue question presented until the issue has been addressed by more courts of appeals in published opinions. This is particularly so

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[1] The Brief in Opposition almost completely ignores the merits of the constitutional venue issue. *Compare* Pet. 11-12 *with* BO 10-11. Thus, it is difficult to discern whether the government disputes that under this Court's cases venue cannot properly lie except in a place where the *actus reus* was done. While it is certainly true that the relational element – "during and in relation to a . . . drug trafficking offense" – is critically important to the federal interest in the offense, that does not transform those "attendant circumstances" into any part of the *actus reus*. The respondent appears to place principal reliance on *United States v. Lombardo*, 241 U.S. 73 (1916), a case in which this Court rejected the government's venue theory and required the case to be prosecuted only in the one place where the prohibited act was done (or required to be done when omitted).

in light of the dearth of recent precedent from this Court addressing venue principles. Moreover, the conflict between the Ninth and Fifth circuits on the issue is highly unlikely to "abate without this Court's intervention." *Id.* As discussed in the following section, the fact that the issue arises here under 28 U.S.C. § 2255 has little or nothing to do with how this court would or should resolve the constitutional venue question. This Court's review of the issue presented at this time will avoid unnecessary confusion and possibly inconsistent decisions by the lower courts on an issue of great constitutional importance.

2. Petitioner's claim is not procedurally barred, and the circuit conflict is properly presented.

The respondent contends that the "conflict [between *Corona* and the decision below] is not properly presented . . . because petitioner is procedurally barred . . . . " BO 6. The respondent asserts that Mr. Pomranz waived his venue claim by failing to raise it in the trial court or on direct appeal, and that he has not "attempted" to demonstrate "cause" and "prejudice" to justify consideration of the merits of his claim in this § 2255 proceeding. *Id.* 7-9. These contentions are wrong as a matter of fact and law, and are not reasons to deny certiorari.

First, petitioner raised one claim concerning venue in his § 2255 motion, and one claim only: ineffective assistance of counsel resulting in violation of his venue rights. *See* Motion, Ground One, page 6. As petitioner pointed out in his reply in the district court to the government's response to his § 2255 motion, this § 2255 proceeding is

Mr. Pomranz's first opportunity to raise the venue/ineffectiveness issue; he continued to be represented by trial counsel throughout his direct appeal. Petitioner's ineffective assistance claim has not been procedurally defaulted, and is not subject to analysis under the "cause" and "prejudice" standard.

Second, even if that standard were applicable, petitioner satisfies it. Mr. Pomranz made a factual record in the district court, in the § 2255 motion that he signed and verified under penalty of perjury, and accompanying memorandum, that (1) he was not personally aware of his venue right; and that (2) his attorney never told him of the venue defense, or that venue was improper. It is undisputed that trial counsel did not object to venue for the gun count (Count 61). Respondent had the opportunity in the district court § 2255 proceedings to attempt to provide a declaration from petitioner's attorney offering any strategic reason for counsel's failure to object to venue or to raise the issue on appeal. But respondent neither disputed petitioner's factual allegations nor secured any affidavit from counsel.

Thus, there is no basis in the record for the government's assertion that counsel "might" have had a strategic reason for his failure to act; BO 9 n.3; rather, the record defeats the presumption, clung to by respondent, that counsel had a strategic reason. *Id.* Based on the uncontradicted facts that are in the record, under Fifth Circuit and this Court's precedent, petitioner's silence cannot be deemed a waiver of the venue objection, and counsel's failure to object was ineffective. "Ineffective assistance of counsel . . . is cause for a procedural

default." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (context of 28 U.S.C. § 2254 habeas review), quoted in *McCleskey v. Zant*, 499 U.S. 467, 494 (1991). See also *Reed v. Farley*, 512 U.S. ___, 114 S.Ct. 2291, 129 L.Ed.2d 277, 292 (1994), citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982) (same cause and prejudice standard applies to § 2255 as § 2254 proceedings).[2]

It is correct that counsel's failure to object to venue on Count 61 must be viewed in the context of counsel's overall trial assistance. See *Kimmelman v. Morrison*, 477 U.S. 365 (1986). But there is nothing in the course of counsel's representation that justifies or mitigates counsel's failure to seek dismissal of a count carrying a mandatory consecutive five year prison term, on which the venue was transparently bad. See *id.* at 386 (finding that

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[2] Respondent's assertion that petitioner "has not renewed" his ineffectiveness claim in this Court, BO 9 n.3, misses the point of the certiorari petition. The petition focuses, as it must, on the reason this Court should grant review of the court of appeals' judgment and opinion. The court of appeals deemed it unnecessary to address the ultimate issue of ineffectiveness due to its ruling that venue was proper on the gun count in Texas; that court addressed only the merits of the underlying constitutional question. Appx. A16. Our petition does the same. The reason this Court should grant a writ of certiorari is because the lower court's decision that venue was proper was wrong as a matter of constitutional law, and directly in conflict with the Ninth Circuit's view. The fact that the issue came up in the context of ineffective assistance is irrelevant for present purposes, although counsel does not in any respect abandon that claim. Upon obtaining a correct venue ruling from this Court, the case will need to be remanded for further proceedings to implement that decision in the present procedural posture of the case.

"[c]ounsel's performance at trial, while generally creditable enough, suggests no better explanation" for failure to conduct pretrial investigation and file suppression motion). Under *Kimmelman*, counsel's overall performance is not viewed in isolation from the error asserted, but rather in terms of its explanatory value in assessing whether counsel's error constituted deficient performance. As this Court noted, "a single, serious error may support a claim of ineffective assistance of counsel . . . . " *Id.* at 383. That is what happened in petitioner's case.

If petitioner is correct on the merits of his venue issue, he certainly has suffered "actual, rather than speculative prejudice," BO 9, by counsel's failure to challenge venue, contrary to respondent's contention. As petitioner asserted in the district court and court of appeals in these § 2255 proceedings, that prejudice is a consecutive five-year prison term on top of the 216-month concurrent prison terms he received on the other counts of the superseding indictment.[3] This Court has never has held – nor has any circuit – that only ineffective assistance which

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[3] Had prior counsel successfully raised a venue challenge before trial, petitioner could then have received an enhancement for possession of the gun in sentencing on the other counts, USSG § 2D1.1(b)(1), but even then he would have received less prison time. Even in the unlikely event that the government would then have gone to the trouble and expense of prosecuting him again separately in Oklahoma for the gun count, USSG § 5G1.3 would have demanded a concurrent sentence. See *United States v. Witte*, 515 U.S. ___, 132 L.Ed.2d 351, 115 S.Ct. 2199 (1995).

renders a verdict unreliable, and not ineffective assistance which results in a conviction and consecutive sentence on a facially dismissable count, can support collateral relief. *Compare* BO 9 n.3.

For these reasons, respondent's attempt to cast petitioner's case in an inappropriate procedural posture for certiorari review must fail.

CONCLUSION

For the foregoing reasons, and for the reasons discussed more fully in the Petition, JEFFREY POMRANZ prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court for further proceedings.

Respectfully submitted,

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October 27, 1995.